STATE OF MICHIGAN
IN THE SUPREME COURT

FEDERATED INSURANCE COMPANY, a foreign corporation, as Subrogee of Carl M. Schultz, Inc., Plaintiff-Appellant,	Supreme Court No. 126886
and	
MICHAEL A. COX, Attorney General, *ex rel* MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, Intervening Appellants,	Court of Appeals No 244009
v	
ROAD COMMISSION FOR OAKLAND COUNTY, a public corporate body, Defendant-Appellee.	Oakland County Circuit Court No. 00-021170-CE

INTERVENING APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

MICHAEL A. COX
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Kathleen L. Cavanaugh (P38006)
Robert P. Reichel (P31878)
Assistant Attorneys General
Environment, Natural Resources,
and Agriculture Division
525 W. Ottawa, Williams Bldg, 6th Floor
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorneys for Intervening Appellants

Dated: July 6, 2005

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF BASIS OF JURISDICTION

On August 23, 2004, Intervening Plaintiff-Appellants, Michael A. Cox, Attorney General *ex rel* Michigan Department of Environmental Quality, filed a timely Application for Leave to Appeal a July 13, 2004, Opinion of the Court of Appeals. On May 12, 2005, this Court granted the Application. This Court has jurisdiction pursuant to MCR 7.301(A)(2).

QUESTIONS PRESENTED FOR REVIEW

I. **The statute of limitations under Part 201 for recovery of response activity costs is within 6 years of initiation of on-site construction for a "remedial action selected or approved" by the Michigan Department of Environmental Quality (MDEQ). In 1991 in response to a release of hazardous substances, Plaintiff initiated free product removal and groundwater treatment without obtaining MDEQ approval. Based on the plain language of Part 201 and its statutory scheme, these activities are interim response activities and they did not constitute an approved remedial action. Was the Court of Appeals wrong as a matter of law in determining that the activities in 1991 were an approved remedial action and therefore the statute of limitation expired in 1997?**

Plaintiff-Appellant would answer "Yes."

Intervening Plaintiff-Appellants answer "Yes."

Defendant-Appellee would answer "No."

Trial Court would answer "No."

II. **Was the Court of Appeals' decision wrong as a matter of law in determining a cause of action for cost recovery accrued before costs had been incurred and before a plaintiff even knows about the environmental contamination?**

Plaintiff-Appellant would answer "Yes."

Intervening Plaintiff-Appellants answer "Yes".

Defendant-Appellee would answer "No."

Trial Court would answer "No."

III. **Does the initiation of on-site construction activities for one release of hazardous substance begin the running of the statute of limitations for any subsequent or unrelated release of hazardous substances?**

Plaintiff-Appellant would answer "No."

Intervening Plaintiff-Appellants answer "No."

Defendant-Appellee would answer "Yes."

Trial Court would answer "Yes."

STATEMENT OF FACTS

Michael A. Cox, the Attorney General, *ex rel*, Michigan Department of Environmental Quality (MDEQ) filed a Notice of Intervention in the Court of Appeals on August 23, 2004. Prior to that date, the MDEQ was not a party to this action. For purposes of this Brief the MDEQ adopts the facts set forth in the Court of Appeals, with some clarification, and for ease of reference repeats them as follows:

> In this case arising from a claim filed under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq.*, for recovery of costs associated with the cleanup of certain real property, plaintiff Federated Insurance Company (Federated), subrogee of plaintiff Carl M. Schultz, Inc., (Schultz) appeals as of right from the trial court's opinion and order granting summary disposition to defendant Oakland County Road Commission (Road Commission) under MCR 2.116(C)(7). We affirm.
>
> I
>
> In February 1988, an underground storage tank and piping on property owned by Schultz released petroleum onto that property, contamination the soil with benzene, toluene, ethyl benzene, and xylenes. Federated insured the property. In May 1988, the Michigan Department of Natural Resources (MDNR)[1] directed Schultz to take all corrective action needed to remediate any environmental damage occurring because of the release. To this end, Schultz hired a contractor, which began construction of an on-site treatment system in November 1991. Schultz submitted a Site Investigation Report and a Site Investigation Work Plan to MDNR in February 1992. Shortly thereafter, the treatment system commenced operations. On January 22, 1993, MDNR approved the Work Plan.
>
> The Road Commission owns and maintains a garage facility adjacent to the Schultz property at 1100 S. Lapeer Road. In April and May 1991, petroleum (diesel and gasoline) had been released on the Road Commission property. This release was reported by the Road Commission to the Michigan State Police Fire Marshall. In January 1992, both Federated and Schultz suspected migration of the Road Commission release onto the Schultz property, and Federated conducted an investigation of this possibility through 1993 and 1994. In February 1995,

[1] Statutory authority, powers, duties, functions, and responsibilities previously vested in the Michigan Department of Natural Resources (MDNR) pursuant to Part 5 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.501 *et seq*, are now vested in the MDEQ pursuant to Executive Order 1995-18. Correspondence and documents prior to 1995 are from MDNR. For ease of reference "MDEQ" will be used when referring to actions and correspondence from the agency both before and after the transfer of authority.

MDNR concluded that at least some of the petroleum detected on the Schultz property had migrated from the Road Commission property. In September 1996, Federated notified the Road Commission because of the alleged migrating contamination. In October 1997, Federated sought but did not obtain the Road Commission's agreement to enter into a tolling agreement to avoid imminent litigation over the contamination question. Federated filed suit on November 1, 2000 under the NREPA for past and future remediation costs associated with releases occurring on the Road Commission property.

The Road Commission moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's action was barred by the statute of limitations provided in MCL 324.20140(1)(a). Section 20140(1)(a) of the NREPA states in relevant part:

> (1) Except as provided in subsections (2) and (3), the limitation period for filing actions under this part is as follows:
>
> (a) For recovery of response activity costs and natural resources damages pursuant to section 20126(1)(a), (b) or (c), within 6 years of initiation of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility.

The Road Commission asserted that because Schultz had initiated physical, on-site construction activities related to remediation in 1991, the statute of limitations for the cost recovery action by Federated expired in 1997. Federated opposed the motion, contending that because it did not receive proof that the petroleum spill on the Road Commission property had migrated to the Schultz property until February 1995, the statute of limitations was tolled until its discovery of that information.

The trial court granted the summary disposition motion, noting in part:

> A plain reading of the statute shows that the triggering event is the "initiation of physical on-site activities." Thus, it is the starting of construction activities to clean up the site, which starts the running of the limitations period.
>
> Here, Plaintiff initiated "physical on-site construction activities" by at least November 1, 1991, when it erected the building used to house the on-site treatment system. This remedial action was approved by the MDNR on January 22, 1993. Therefore, Defendant is correct that Plaintiff had until November 1, 1997 to timely file a complaint against Defendant for recovery of response activity costs. This fact was known to Plaintiff as evidenced by its seeking a tolling agreement from Defendant.

> Moreover, even if the Court were to determine that the triggering event for the statute of limitations was the MDNR's approval of Schultz's remedial action plan, Plaintiff's claim was still late by almost two years.[2]

It should be noted that the Work Plan referred to in the second paragraph of the Court of Appeals decision, was, as the title demonstrates, a work plan for site investigation. The plan also included free product removal of gasoline constituents from the groundwater.[3] MDEQ's letter specifically stated that the approved work did not constitute approval of all the work necessary at the site:

> The MDEQ expects that the above conditions be complied with to complete the investigation and to control the free product at the site. A complete report on the work performed, including analytical data and corrective action proposal, should be submitted in this office by May 24, 1993. Failure to do so may be a violation of the LUST Act, MUSTFA Act, or the Michigan Environmental Response Act (PA 307 of 1982, as amended).
>
> * * *
>
> This should not be construed as a sign-off on all investigations or corrective actions that may be required by the state. [4]

On July 2, 1993, the MDEQ sent a letter to Mr. Schultz. This letter also indicates that, as of July 2, 1993, investigations of the contamination were ongoing and that a "final corrective action proposal should be submitted."[5] The letter further states:

> The design, sampling plan, and O & M plan for the free product collection/groundwater treatment system should be included as part of your final corrective action plan (CAP). The CAP should also contain provisions to remediate the contaminated soils at this site in addition to the groundwater

---

[2] *Federated Ins Co v Oakland Co Road Comm*, 263 Mich App 62, 64-66; 687 NW2d 329 (2004), Appendix p 28a.
[3] Appendix p 15a
[4] Appendix p 15 b-c.
[5] Appendix p 21a.

> treatment. Pilot test data will be necessary in order to verify the effective treatment (capture) zones of the soil and groundwater remediation systems.[6]

In March of 1995 a letter was sent by MDEQ to the Oakland County Road Commission. In this letter MDEQ states that "investigation and *interim* corrective action activities" were undertaken at the Schultz property.[7] The interim activities are characterized as free product removal/construction of a groundwater treatment system.[8] There is no evidence from the record below that a remedial action was approved by the MDEQ.

On August 23, 2004, the MDEQ filed an Application for Leave to Appeal with this Court. On May 12, 2005, this Court granted the Application, stating:

> The parties are directed to include among the issues to be briefed: (1) whether the work initiated in 1991 was an "interim response activity" that did not trigger the statute of limitations provision set out in MCL 324.20140(1)(a) rather than a "remedial action" that must first be "approved or selected" by the Department of Environmental Quality; and (2) whether the initiation of work for one release of hazardous substances begins the running of the statute of limitations for any subsequent or unrelated release of hazardous substances.[9]

---

[6] *Id.*
[7] Appendix p 18a (emphasis added).
[8] *Id.*
[9] *Federated Ins Co v Oakland Co Rd Comm*, 472 Mich 898; 696 NW2d 708 (2005).

ARGUMENT

I. The Court of Appeals' decision, interpreting the statute of limitations under Part 201, is wrong as a matter of law because the Court ignored both the plain language of Part 201 and its statutory scheme in determining that the statute of limitations had expired.

A. Standard of Review

The issue to be reviewed by this Court is a question of law: when does a claim for response activity costs under Part 201 of NREPA accrue under the statute of limitation contained in § 20140 of NREPA.[10] Therefore, the proper standard of review is *de novo*.[11]

B. Statutory Background

In the case at hand the Michigan Court of Appeals erroneously interpreted certain definitions set forth in Part 201 and concluded that the Plaintiff's cost recovery claims were barred under the statute of limitations set forth in § 20140, which states:

> (1) Except as provided in subsections (2) and (3), the limitation period for filing actions under this part is as follows:
>
> > (a) For the recovery of response activity costs and natural resources damages pursuant to section 20126a(1)(a), (b), or (c), within 6 years of initiation of physical on-site construction activities *for the remedial action selected or approved by the department* at a facility, except as provided in subdivision (b).
> >
> > (b) For 1 or more subsequent actions for recovery of response activity costs pursuant to section 20126, at any time during the response activity, if commenced not later than 3 years after the date of completion of all response activity at the facility.
> >
> > (c) For civil fines under this part, within 3 years after discovery of the violation for which the civil fines are assessed.

---

[10] MCL 324.20140.

[11] *City of Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 624; 583 NW2d 215 (1998); *Wechsler v Wayne County Road Commission*, 215 Mich App 579, 596, n 12; 546 NW2d 690 (1996); *Smeets v Genesee Co Clerk*, 193 Mich App 628, 633; 484 NW2d 770 (1992).

(2) For recovery of natural resources damages that accrued prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994.

(3) For recovery of response activity costs that were incurred prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994.

(4) Subsection (3) is curative and intended to clarify the original intent of the legislature and applies retroactively.[12]

The Oakland County Road Commission (Road Commission) claimed that a "remedial action" was initiated at the Schultz property in 1991, and therefore the six year statute of limitations set forth in § 20140(1)(a) applied, and began to run in 1991. The Court of Appeals agreed. However, the Court clearly erred in at least two respects. First, it held that the statute of limitations was triggered regardless of whether, or when, a remedial action was selected or approved by the MDEQ. That is contrary to the plain language of § 20140(1)(a). Second, the Court failed to properly apply the term "remedial action" as used in Part 201. It is clear, under Part 201, that the work undertaken in 1991 was not a "remedial action" but instead constituted "evaluation" and "interim response activities." Therefore, § 20140(1)(a) does not bar any of the Plaintiff's claims.

C. The Court of Appeals did not apply the plain language of Section 20140(1)(a) that the statute of limitations is triggered by "the remedial action selected or approved by the department at a facility."

The Court of Appeals held that the statue of limitations was triggered in 1991, when Schultz began construction of a treatment system that was considered a "remedial action," despite the fact that the so-called "remedial action" was *not* approved by the MDEQ's predecessor, the MDNR, in 1991.[13] Section 20140(1) unambiguously refers to the "remedial action selected or approved by the department at a facility."

---

[12] MCL 324.20140 (emphasis added).
[13] *Federated Ins Co*, 263 Mich App at 68; Appendix p 31a.

Both initiation of on-site construction of a remedial action *and* approval and selection by the MDEQ must occur before the statute of limitations begins to run. The Court of Appeals' interpretation clearly violates the well-established rules of statutory construction. It is a fundamental precept that statutes must be applied as written unless the statute is ambiguous or unclear.[14] It is also impermissible for a court to broaden or narrow the construction of a statute to vary from the clearly expressed language enacted by the Legislature.[15] Further, effect must be given, if possible, to every word, sentence and section of a statute and no provision should be treated as surplusage or rendered a nullity.[16]

It was clear error for the Court of Appeals to eliminate the explicit statutory requirement that the remedial action be selected or approved by the MDEQ before the statute of limitations begins to run. As set forth in Argument II, *infra*, this not only violates the principles that a statute be interpreted as written, it also results in the absurdity that the statute of limitations will run before the MDEQ has incurred costs or even obtained knowledge that contamination exists.

D. The work initiated by Plaintiff in 1991 was not "the remedial action ... at a facility" but was instead "evaluation" and "interim response activities" that did not trigger the statute of limitations under Section 20140(1)(a).

Part 201 contains the following definitions all of which are relevant to the interpretation of § 20140(1)(a):

> (m) "evaluation" means those activities including, but not limited to, investigation, studies, sampling, analysis, development of feasibility studies, and administrative efforts that are needed to determine the nature, extent, and impact of a release or threat of release and necessary response activities.[17]

---

[14] *Metropolitan Council 23 v Oakland County*, 409 Mich 299, 318; 294 NW2d 578 (1980).
[15] *Guitar v Bieniek,* 402 Mich 152, 158; 262 NW2d 9 (1978).
[16] *Baker v General Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980), *aff'd* 478 US 621 (1986); *Travelers Ins Co v S & H Tire Co*, 134 Mich App 214, 225; 351 NW2d 279 (1994), *lv den* 419 Mich 960 (1984).
[17] MCL 324.20101(1)(m).

(u) "Interim response activity" means the *cleanup* or *removal* of a released hazardous substance or the taking of other actions, *prior to the implementation of a remedial action*, as may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment. Interim response activity also includes, but is not limited to, measures to limit access, replacement of water supplies, and temporary relocation of people as determined to be necessary by the department. In addition, interim response activity means the taking of other actions as may be necessary to prevent, minimize, or mitigate a threatened release.[18]

(cc) "Remedial action" includes, but is not limited to, cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.[19]

(ee) "Response activity" means evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the department of public health and enforcement actions related to any response activity.[20]

(ff) "Response activity costs" or "costs of response activity" means all costs *incurred* in taking or conducting a response activity, including enforcement costs.[21]

In the case at hand the Court of Appeals, applying some of these definitions, found as follows:

Applying these definition to the facts of the case, it is apparent that under the plain language of the statute, the initiation of construction of the on-site treatment facility in 1991 constituted "on-site construction activities" in preparation for the "treatment" and the taking of other action that may be necessary to prevent, minimize, or mitigate injury to the public health, safety of [sic] welfare, or to the environment". Thus, on-site construction constitutes remedial action within the meaning of the NREPA.

* * *

---

[18] MCL 324.20101(1)(u)(emphasis added).
[19] MCL 324.20101(1)(cc).
[20] MCL 324.20101(1)(ee).
[21] MCL 324.20101(1)(ff) (emphasis added).

> Nothing in the statute provides that activities must first be approved by MDNR in a work plan in order to be characterized as remedial action, as that term is defined in the NREPA. Rather, the statute makes a clear distinction between remedial action and a remedial action plan. Because Schultz began remedial action activities in 1991, consistent with the Work Plan submitted to and approved by MDNR in 1993, Federated's complaint is barred by the statute of limitations.
>
> * * *
>
> Federated's next contention, that this Court should apply a discovery rule to the statute of limitations and conclude that the statute of limitations was tolled until 1995, is also misplaced. We first note that nothing in the language of § 20140(1)(a) evidences any intent to toll the running of the applicable period of limitations pending the potential future discovery of additional releases of contaminants from other sources. Second, § 20140(1)(c) expressly provides that the limitation period for bringing an action for civil fines under the NREPA is three years after the discovery of the violation for which civil fines may be assessed. The Legislature's clear imposition of a discovery rule in actions brought under § 20140(1)(c) in the face of the Legislature's failure to clearly impose a discovery rule in actions brought under § 20140(1)(a) is strong evidence that the Legislature did not intend the application of a discovery rule under the circumstances in this case. *People v Wilcox*, 83 Mich App 654; 269 NW2d 256 (1978).[22]

The Court of Appeals' decision is flawed in several respects. First, it essentially holds that the terms "remedial action" and "response activity" mean the same thing. The terms are not interchangeable and clearly have different meanings when the statute and the implementing administrative rules promulgated by the MDEQ are read as a whole.

A second basic flaw in the Court of Appeals' analysis is that it narrowly focused only on the definitions of " response activity" and "remedial action" in §§ 20101(ee) and 20101(cc) and failed to consider other relevant statutory provisions of Part 201 and its associated administrative rules[23] as a whole. "[The Legislature's] intention is to be drawn from an examination of the language itself, the subject matter under consideration, and the scope and purpose of the act."[24]

---

[22] *Federated Ins Co,* 263 Mich App at 68-69, Appendix p 31a.
[23] 2002 AACS, R 299.5101 *et seq.*
[24] *Crawford v School District Number 6*, 342 Mich 564, 568; 70 NW2d 789 (1955).

"[A]n act must be construed as a whole, and the particular effect to be attached to any word, clause or provision determined from the context of the whole act, the nature of the treated subject matter, and the purpose and intention of the body that promulgated the act."[25]

The Court of Appeals' analysis fails to consider other provisions of Part 201 and its administrative rules, which clearly establish that the work initiated in 1991 and the work approved by MDEQ constituted response activities, including evaluation and interim response activities, but did not constitute "remedial action." While the general definitions of remedial action, interim response activity, and response activity are similar, a remedial action and an interim response activity are separate and distinct activities under Part 201. The term "response activity" is broad and all-inclusive. It subsumes the terms "remedial action" and "interim response activity," thus making it clear, as in the context of cost recovery, that all costs of "response activities" are recoverable, including remedial action costs, interim response activity costs, and evaluation costs. "'Response activity costs' or 'costs of response activity' means all costs incurred in taking or conducting a response activity, including enforcement costs."[26]

In the case at hand the work plan approved by MDEQ was for evaluation and interim response activities and not remedial action. In the January 23, 1993, letter the MDEQ approved, with certain conditions, a "Site Investigation Report and Site Investigation Work Plan."[27] Paragraph 2 of MDEQ's letter states that Schultz must "[c]ontinue the investigation to completely define the vertical and horizontal extent of soil and groundwater contamination."[28] This is clearly "evaluation" as defined in subsection 20101(1)(m) and is not a remedial action as defined in subsection 20101(1)(cc).

---

[25] *Metropolitan Council 23*, 409 Mich at 318.
[26] MCL 324.20101(1)(ff).
[27] Appendix p 15a.
[28] Appendix p 15a.

Paragraph 1 of this letter states:

> Elevated levels of contaminants and measurable free product in the monitoring wells have been documented. Pursuant to Section 7(5) of the LUST Act, a site where an investigation indicates the presence of free product, the owner/operator must promptly minimize the spread of contamination into uncontaminated zones. Although, free product removal has been proposed, no action has been taken to date. Again you are requested to immediately implement a groundwater treatment system as previously proposed and/or another method to captured [sic] free product. Also, provide a monthly free product removal report as outline [sic] in Section 7(5)(d). You are requested to notify this office within 14 days of receipt of this letter on your intent to comply with this matter.[29]

The MDEQ required free product removal and treatment of the contaminated groundwater that was removed. Apparently, the implementation of construction activities associated with free product removal and treatment of the contaminated water was considered "initiation of physical on-site construction activities for the remedial action" by the Court of Appeals. However, it is clear that free product removal is an interim response activity not a remedial action, and the distinction between these two activities cannot be discerned solely from their general definitions. Rather, these two terms, that are both categories of response activities, must be read in the context of Part 201 as a whole and its implementing rules.

Specifically, § 20118 of NREPA[30] is not part of the definition of a remedial action. However, this does not mean that it can be ignored when trying to understand the relationship between a "remedial action" and an "interim response activity" for purposes of Part 201. The Court must look to the entire statutory and regulatory scheme.

The Legislature's intent in enacting Part 201 of NREPA was two-fold: protecting the public and environment through response activities and requiring that the cost of cleaning up

---

[29] Appendix p 15a.
[30] MCL 324.20118

contaminated sites be borne by those responsible and not the state.[31] Part 201 created a framework for accomplishing these purposes by *inter alia* providing general definitions of various response activities in MCL 324.20101, affirmatively requiring owners and operators of facilities to perform various response activities identified in MCL 324.20114(1), and also, in MCL 324.20118(2), providing minimum requirements that a response activity must meet for it to be considered a remedial action under the statute. MCL 324.20118 states, in part:

> (1) The department may take response activity or approve of response activity proposed by a person that is consistent with this part and the rules promulgated under this part relating to the selection and implementation of response activity that the department concludes is necessary and appropriate to protect the public health, safety, or welfare, or the environment.
>
> (2) *Remedial action* undertaken under subsection (1) at a minimum *shall accomplish all of the following*:
>
> (a) Assure the protection of the public health, safety, and welfare, and the environment.
>
> (b) Except as otherwise provided in subsections (5) and (6), *attain a degree of cleanup and control of hazardous substances that complies with all applicable or relevant and appropriate requirements, rules, criteria, limitations, and standards of state and federal environmental law.*
>
> (c) Except as otherwise provided in subsections (5) and (6), *be consistent with any cleanup criteria incorporated in rules promulgated under this part.*[32]

If a response activity does not meet the minimum requirements set forth in MCL 324.20118(2), it is not and cannot be considered a remedial action under Part 201 of NREPA for any purpose, including commencing the running of the statute of limitations. The Court of Appeals failed to consider the minimum requirements of a remedial action in its decision. The Work Plan in the case at hand could not even begin to meet the requirements of § 20118(2) because the extent of the contamination and the magnitude of the problem had not been fully defined. Since the extent

---

[31] MCL 324.20102.
[32] MCL 324.20118(1) and (2)(emphasis added).

of the problem had not even been defined, the Work Plan could not "attain a degree of cleanup and control of hazardous substances that complied with all applicable or relevant and appropriate requirements."[33]

It is also clear under Part 201 that interim response activities are not remedial actions, but are actions taken prior to a remedial action. "'Interim response activity' means the *cleanup* or *removal* of a released hazardous substance or the taking of other actions, *prior to the implementation of a remedial action*...."[34] In MCL 324.20114, the Legislature specified various affirmative obligations of liable owners and operators of facilities. MCL 324.20114(1) reads as follows:

> Except as provided in subsection (4), an owner or operator of property who has knowledge that the property is a facility and who is liable under section 20126 shall do all of the following:
>
> (a) Determine the nature and extent of a release at the facility.
>
> (b) Report the release to the department within 24 hours after obtaining knowledge of the release. The requirements of this subdivision shall apply to reportable quantities of hazardous substances established pursuant to 40 C.F.R. 302.4 and 302.6 (1989), unless the department establishes through rules alternate or additional reportable quantities as necessary to protect the public health, safety, or welfare, or the environment.
>
> (c) Immediately stop or prevent the release at the source.
>
> (d) Immediately implement source control or removal measures to remove or contain hazardous substances that are released after the effective date of the 1995 amendments to this section if those measures are technically practical, cost effective, and provide protection to the environment. At a facility where hazardous substances are released after the effective date of the 1995 amendments to this section, and those hazardous substances have not affected groundwater but are likely to, groundwater contamination shall be prevented if it can be prevented by measures that are technically practical, cost effective, and provide protection to the environment.

---

[33] MCL 324.20118(2)(b).
[34] MCL 324.20101(1)(u).

(e) Immediately identify and eliminate any threat of fire or explosion or any direct contact hazards.

(f) *Immediately initiate removal of a hazardous substance that is in a liquid phase, that is not dissolved in water, and that has been released.*[35]

(g) Diligently pursue response activities necessary to achieve the cleanup criteria specified in this part and the rules promulgated under this part. For a period of 2 years after the effective date of the 1995 amendments to this section, fines and penalties shall not be imposed under this part for a violation of this subdivision.

(h) Upon written request by the department, take the following actions:

(i) *Provide a plan for and undertake interim response activities.*

(ii) Provide a plan for and undertake evaluation activities.

(iii) Take any other response activity determined by the department to be technically sound and necessary to protect the public health, safety, welfare, or the environment.

(iv) *Submit to the department for approval a remedial action plan that, when implemented, will achieve the cleanup criteria specified in this part and the rules promulgated under this part.*

(v) Implement an approved remedial action plan in accordance with a schedule approved by the department pursuant to this part.[36]

Under the statutory scheme of Part 201, free product removal is clearly included within the universe of "interim response activities" and is distinct from remedial action required under, for example, MCL 324.20114(1)(h)(v), MCL 324.20118(2), and MCL 324.20120a.

The Part 201 administrative rules, that were promulgated in July, 1990, shortly before the enactment of the current statutory definitions of "interim response activity" and "remedial action" in Part 201, even more clearly demonstrate that the Legislature intended "interim

---

[35] This is free product removal. See definition of "free product," MCL 324.20101(1)(r):"'Free product' means a hazardous substance in a liquid phase equal to or greater than 1/8 inch of measurable thickness that is not dissolved in water and that has been released into the environment."

[36] MCL 324.20114(1)(emphasis added).

response activity" to include, among other things, source control measures and free product removal. Those rules defined "interim response activity" virtually identically to MCL 324.20101(1)(u). Rule 299.5101(o) defines interim response activity as:

> [T]he cleanup or removal of released hazardous substances from the environment or the taking of such other actions, prior to the selection of a remedial action, as may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, the environment, or natural resources, which injury might otherwise result from a release of a hazardous substance. The term also means the taking of such other actions as may be necessary to prevent, minimize, or mitigate the potential release of a discarded hazardous substance."[37]

Additionally, Rule 299.5501(2) establishes that source control measures are "interim response activities" and provides:

> To minimize impacts on the public health and the environment from hazardous substances, *source control*, abatement, *or other interim response* activities shall be undertaken when it is feasible and prudent, consistent with the provisions of R 299.5509.[38]

Rule 299.5509(2) expressly provides that "interim response activities may include . . . groundwater control or removal systems."[39] Interim response activities include precisely the same kind of action initiated by Schultz in 1991, they are not "remedial actions."

Revised Part 201 rules were promulgated and were effective as of December, 2002.[40] These rules also demonstrate that there is a difference between remedial action and interim response activity. Rule 299.5532(1) specifically states that in order for a response activity to be a remedial action it must meet all the requirements of §§ 20118, 20120a, and 20120b:

> A remedial action shall be performed by a person when the department requests one under section 20114(1)(h) of the act or when the objective of a response activity, including response activity undertaken to comply with section 20114(1)(g) of the act, is to address all releases of hazardous substances in all

---

[37] See 1990 AACS R 299.5101(o).
[38] 1990 AACS R 299.5501(2) (emphasis added).
[39] 1990 AACS R 299.5509(2)(h).
[40] 2002 AACS R 299.5101 *et seq.*

> environmental media at a facility consistent with sections 20118, 20120a and 20120b of the act, except as provided in R 299.5534 and R 299.5536. *Response activity will be considered a remedial action only if it complies with sections 20118, 20120a, 20120b of the act and these rules.*[41]

The MDEQ has consistently, since § 20140 was enacted in 1991, interpreted a "remedial action" as being a response activity that meets all the requirements of §§ 20118, 20120a and 20120b. "It is well settled that the construction placed upon statutory provisions by any particular department of government for a long period of time, although not binding upon the courts, should be given considerable weight."[42]

In addition, Rule 299.5520(2) states: "In selecting an appropriate response activity, a person shall first assess *whether interim response activity is appropriate before remedial action*, consistent with the terms of R 299.5526."[43] Rule 299.5526(4)(c) again confirms that free product removal is an interim response activity that must be taken immediately:

> A person who is subject to section 20114 of the act shall undertake or provide for the specific interim response activities which are described in this subrule if applicable to the circumstances in question. The required action shall be initiated immediately upon obtaining information reasonably supporting the conclusion that a condition exists which necessitates interim response activity and shall continue as necessary to mitigate or eliminate threats to the public health, safety, or welfare or to the environment. The obligation of a person to respond under this subrule is not limited by his or her property boundaries if contamination for which that person is liable has migrated. Interim response activities are presumptively determined to be necessary by the department at a facility to protect the public health, safety, and welfare and the environment in all of the following circumstances:
>
> * * *
>
> (c) If there is free phase liquid hazardous substance present at the facility, then the person who is subject to section 20114 of the act shall immediately implement

---

[41] 2002 AACS R 299.5532(1)(emphasis added).

[42] *Southfield Police Officers Association v City of Southfield*, 433 Mich 168; 445 NW2d 98 (1989), citing *Allen v Detroit Police Dep't Trial Bd,* 309 Mich 382, 386; 15 NW2d 676 (1944) and *Breuhan v Plymouth-Canton Community Schools*, 425 Mich 278, 282-283; 389 NW2d 85 (1986).

[43] 2002 AACS R 299.5520(2)(emphasis added).

> source control measures to remove reasonably recoverable free phase liquid on an ongoing basis to reduce the potential for increasing environmental damage.[44]

In many instances the MDEQ has undertaken activities that are interim response activities and not remedial actions. For a variety of reasons the MDEQ may not have filed suit for recovery of these costs within six years. These reasons include failure to identify the liable party, protracted negotiations with parties, failed agreements with the liable parties to take over the necessary additional work, and lack of MDEQ resources to pursue claims. The Court of Appeals' decision effectively threatens the MDEQ's or any other plaintiff's[45] ability to recover costs associated with interim response activities, even though no remedial action has been taken nor has a remedial action been selected or approved by the MDEQ. Under the statute it is clear that the statute of limitations requires a claim to be brought within six years after initiation of physical on-site construction activities for the remedial action selected or approved by the MDEQ. Pursuant to Part 201 a response activity must meet certain requirements to constitute a remedial action. The Court of Appeals ignored this important distinction in its interpretation of § 20140(1).

---

[44] 2002 AACS R 299.5526(4)(c).

[45] Part 201 provides for recovery of response activity costs incurred by the State, MCL 324.20126a(1)(a), or "any other person," MCL 324.20126a(1)(b). Non-governmental cost recovery actions are an integral part of the legislative scheme for protecting public health and the environment in Part 201, and the express legislative declaration "[t]hat to the extent possible...response activities shall be undertaken by persons liable under this part." MCL 324.20102(g).

II. The Court of Appeals' decision erroneously results in the statute of limitations for recovery of costs running before the costs have been incurred, and a cause of action accruing before all the elements of a cost recovery claim are present.

A claim cannot accrue until all of its elements are present.[46] It is clear from the language and statutory scheme of Part 201 that incurring costs is an essential element of a cost recovery claim. Thus, a claim for response activity costs cannot accrue until the costs a plaintiff is seeking to recover have been incurred.

Section 20126(1) of NREPA identifies persons who are liable under Part 201.[47] Section 20126a(1) describes the scope of liability for persons who are liable under Part 201:

> (1) Except as provided in section 20126(2), a person who is liable under section 20126 is jointly and severally liable for all of the following:
>
> (a) *All costs* of response activity lawfully *incurred* by the state relating to the selection and implementation of response activity under this part.
>
> (b) Any other necessary costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgated under this part.[48]

According to the plain language of these sections, a person listed in § 20126(1) shall be liable for costs of response activity *incurred.*

The definition of response activity costs also leads to the conclusion that costs must be incurred before a claim accrues. "Response activity costs" is defined under § 324.20101(ff), as follows:

---

[46] See *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 151; 200 NW2d 70 (1972); *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 244; 492 NW2d 512 (1992); *Thomas v Process Equipment Corp*, 154 Mich App 78, 87; 397 NW2d 224 (1986); *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986).

[47] MCL 324.20126(1).

[48] MCL 324.20126a(1) (emphasis added).

> "Response activity costs" or "costs of response activity" means all costs *incurred* in taking or conducting a response activity, including enforcement costs.[49]

Costs "incurred" is within the very definition of response activity costs. It is therefore an essential part of a claim for response activity costs. Consequently, the costs a party is seeking to recover must be incurred before a claim for recovery of those costs can accrue.

The Court of Appeals determined that a claim for cost recovery accrues when any party initiates "on-site construction" regardless of whether the party seeking to recover costs has even incurred any costs. A liable or nonliable party may initiate construction but not complete a cleanup. If a second party, namely the MDEQ, must come in years later and complete the clean up, under the Court of Appeals' interpretation, the statute of limitations could run before the MDEQ has even incurred any costs. Furthermore, by eliminating the statutory requirement that a remedial action be selected or approved by the MDEQ before the statute of limitation begins to run, the MDEQ, or any other affected party, may not even know that an environmental problem exists and thus that a potential claim exists.

Established case law interpreting the Michigan Environmental Response Act (MERA),[50] the predecessor to Part 201, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the federal statute that Part 201 is modeled after, also support the position that the costs a party seeks to recover must be incurred before the claim accrues.

---

[49] MCL 324.20101(1)(ff) (emphasis added).
[50] MCL 299.601 *et seq.*

Numerous cases have held that MERA and Part 201 should be interpreted in light of CERCLA and the cases that interpret CERCLA.[51]

The fact that these statutes are not identical in all respects does not preclude the courts from comparing relevant portions of the statutes. Although under Part 201 the definition of a liable party is more narrow in scope than the definition of a liable or responsible party under CERCLA, both statutes require essentially the same elements to establish a claim. "Like its federal counterpart [CERCLA], the MERA imposes liability where there has been (1) a release of a hazardous substance, (2) at a facility, (3) *causing plaintiff to incur response costs*, and (4) defendant is a responsible party."[52]

This Court made it clear in *Shields v Shell Oil Company,*[53] that the incurrence of response activity costs was necessary for accrual of a claim for a recovery of response activity costs. In *Shields v Shell Oil Company,* the Court of Appeals held that a cause of action for cost recovery accrued when the contamination was discovered.[54] The Court of Appeals interpreted § 324.20140(2) which read, at the time, as follows:

> For recovery of response activity costs and natural resources damages that *accrued* prior to the effective date of this section, the limitation period for filing actions under this act shall be 3 years from that effective date.[55]

---

[51] See generally, *Kelley v E.I. du Pont de Nemours & Co,* 786 F Supp 1268 (ED Mich 1992), *aff'd* 17 F3d 836 (CA 6, 1994); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1; 596 NW2d 620 (1999); *Farm Bureau Mut Ins Co v Porter & Heckman,* 220 Mich App 627; 560 NW2d 367 (1996); *Flanders Industries v State of Michigan*, 203 Mich App 15; 512 NW2d 328 (1993); and *Genesco, Inc v Michigan Dep't of Environmental Quality,* 250 Mich App 45; 645 NW2d 319 (2002) .

[52] *Cipri*, 235 Mich App at 5, *citing Farm Bureau Mut Ins Co*, 220 Mich App at 637, 639-641 (emphasis added).

[53] *Shields v Shell Oil Company,* 463 Mich 939; 621 NW2d 215 (2000).

[54] *Shields v Shell Oil Company,* 237 Mich App 682; 604 NW2d 719 (1999), *rev'd* 463 Mich 939 (2000).

[55] MCL 324.20140(2), prior to amendment by PA 254 of 2000 (emphasis added).

Due to the erroneous interpretation of the statute of limitations by the Court of Appeals, the Legislature amended § 324.20140(2). The amended statute of limitations is set forth on pages 4-5 of this Brief. The amendment was intended to clarify that a cause of action did not accrue until costs were incurred.[56] The Attorney General was not a party to *Shields*, but intervened for the purpose of appealing. This Court granted the Attorney General's motion for peremptory reversal in *Shields* and stated:

> In lieu of granting leave to appeal, the motion for peremptory reversal of the October 1, 1999, decision of the Court of Appeals is granted, and the June 2, 1997, order of the Oakland Circuit Court is vacated. Under either the former or amended version of MCL 324.20140; MSA 13A.20140, it is clear that only actions for recovery of response activity costs *incurred* before July 1, 1991, were subject to the July 1, 1994, limitation period. The matter is remanded to the Oakland Circuit Court for further proceedings. Jurisdiction is not retained.[57]

Thus, it is evident that this Court understood that the plaintiff must incur costs before its cause of action for cost recovery can accrue.

Here, the Court of Appeals once again held that a cause of action for cost recovery can accrue before the costs a plaintiff is seeking to recover are incurred. This is clearly inconsistent with this Court's decision in *Shields* and with the statutory scheme. Under the rationale of the Court of Appeals' decision, MDEQ would be required to bring a cost recovery action within six years after any party initiated any activity at a facility that constituted "on-site construction activities" in preparation for the "treatment" and the taking of any other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare or the environment, even if the MDEQ had not yet incurred costs and even if the MDEQ had not approved the work or knew an environmental problem existed.

---

[56] See MCL 324.20140(4).

[57] *Shields,* 463 Mich 939 (emphasis in the original).

A liable party will often undertake some initial response activity in response to a release but fail to fully remediate or undertake an approvable remedial action as required by Part 201. MDEQ is then left with taking over the cleanup at public expense. Depending on priorities, workload, and available funding, MDEQ's actions may happen immediately or the facility may be added to the list of facilities that need to be addressed at a later date.

It is nonsensical to require MDEQ to sue to recover costs before it has incurred costs merely because the liable party has taken some action. This would require the courts to entertain claims even though the MDEQ had not incurred costs and may never incur costs. It could result in the statute of limitation running before a claim ever accrued or before costs were incurred. Furthermore, it results in the statute of limitations accruing before the MDEQ or any other affected party knew there was a claim. This clearly was not the intent of the Legislature nor is it supposed by the plain language of the statute.

The statute of limitations should not be interpreted to bar a cost recovery action where the MDEQ does not even know a problem exists. The Court of Appeals specifically rejects the discovery rule as being applicable to the statute of limitations under Part 201. While the discovery rule may not be applicable under a strict reading of the statute of limitations, incurring costs is an essential part of the claim. A party can only incur costs if it knows a problem exists.

III. The Court of Appeals' decision was wrong as a matter of law in stating that initiation of work for one release started the running of the statute of limitations for any subsequent or unrelated releases of hazardous substances.

In the Order granting MDEQ's Application for Leave to Appeal this Court directed the parties to brief "whether the initiation of work for one release of hazardous substances begins the

running of the statute of limitations for any subsequent or unrelated release of hazardous substances."[58]

The Court of Appeals viewed this issue as "tolling" the statute of limitations and stated:

> *We first note that nothing in the language of § 20140(1)(a) evidences any intent to toll the running of the applicable period of limitations pending the potential future discovery of additional releases of contaminants from other sources.* Second, § 20140(1)(c) expressly provides that the limitation period for bringing an action for civil fines under the NREPA is three years after the discovery of the violation for which civil fines may be assessed. The Legislature's clear imposition of a discovery rule in actions brought under § 20140(1)(c) in the face of the Legislature's failure to clearly impose a discovery rule in actions brought under § 20140(1)(a) is strong evidence that the Legislature did not intend the application of a discovery rule under the circumstances in this case. *People v Wilcox*, 83 Mich App 654; 269 NW2d 256 (1978).[59]

A new or subsequent release results in a new cause of action for cost recovery, once costs associated with the new release have been incurred. There is no need to even consider whether the discovery rule applies to the statute of limitations under Part 201.

As set forth in Argument II of this Brief, a party must incur costs before it has a claim for cost recovery. If there is a new release of hazardous substances at the same property, costs must be incurred for the new release before a claim accrues. Moreover, if there is a new release, a remedial action must be selected or approved for the new release and on-site construction activities must be initiated before the statute of limitations begins to run. See Argument I.

Section 20140(1)(a) states that a claim for cost recovery must be initiated "within 6 years of the initiations of on-site construction activities for the remedial action selected or approved by the department *at a facility*."[60] A "facility" is defined by Part 201 as:

> [A]ny area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located. Facility does

---

[58] *Federated Ins Co*, 472 Mich 898.
[59] *Federated Ins Co*, 263 Mich App at 69; Appendix p 31a.
[60] MCL 324.20140(1)(a)(emphasis added).

> not include any area, place, or property at which response activities have been completed which satisfy the cleanup criteria for the residential category provided for in section 20120a(1)(a) and (17) or at which corrective action has been completed under part 210 which satisfies the cleanup criteria for unrestricted residential use.[61]

A new release of hazardous substances creates a new facility. The new facility may, in some instances, overlap or commingle with an existing facility, but the statute of limitations for costs incurred responding to the release at the new facility only begins to run after on-site construction is initiated for the remedial action selected or approved by the department *at the facility*. There is simply no basis or reason to tie the running of the statute of limitations for one release or one facility to a new or subsequent release that creates a new facility as defined by Part 201.

In the case at hand, Schultz's release of hazardous substances created a facility. There was also release of a hazardous substance at the Road Commission's property that created another facility. The releases or contamination from the facilities commingled. There are two different facilities and both need to be addressed through implementation of response activities including implementation of a remedial action. In this case, it is clear that as of March 28, 1995, when MDEQ first notified the Road Commission that there was a release of a hazardous substance on the Road Commission's property, that no remedial action had been selected or approved by the MDEQ for the Road Commission's facility, nor apparently had the Road Commission taken any action with regard to the release of hazardous substances on its property.[62] Schultz's had inadvertently treated some of the contamination from the Road Commission's facility. But, because no remedial action had been selected or approved by the

---

[61] MCL 324.20101(1)(o).
[62] Appendix p 18a.

MDEQ for the Road Commission's facility, the statute of limitations did not begin to run for the costs associated with the Road Commission's facility.

Under the Court of Appeals reasoning, once the statute of limitations for one release expires, the real property encompassed by the original release can never be subject to another cost recovery action. In other words, a party could have a subsequent release of hazardous substances six years after initiating on-site construction for a remedial action selected or approved by the MDEQ and not be subject to a claim for cost recovery. Such a result is clearly inconsistent with the intent of the statute that polluters should pay for the contamination they cause.[63]

If the Court of Appeals had correctly interpreted the statute of limitations, it would be clear that initiation of work for one release does not begin the running of the statute of limitations for a second or subsequent release. The statute of limitations for a second or subsequent release only begins to run after a remedial action for the new release is selected and approved by the MDEQ and on-site construction activities are initiated.

[63] MCL 324.20102(f).

CONCLUSION AND RELIEF SOUGHT

The Court of Appeals misinterpreted the statute of limitations in Part 201. It is clear from the language of the statute and statutory framework that the statute of limitations does not begin to run until a remedial action is selected or approved by the MDEQ and on-site construction is initiated. It is also clear that interim response activities are not the equivalent of a remedial action. Finally, a new release of a hazardous substance creates a new facility that will have its own separate and distinct statute of limitations period that is separate from any earlier releases of hazardous substances.

For these reasons, the Intervening-Appellants respectfully request that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

MICHAEL A. COX
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Kathleen L. Cavanaugh (P38006)
Robert P. Reichel (P31878)
Assistant Attorneys General
Environment, Natural Resources,
and Agriculture Division
525 W. Ottawa, Williams Bldg, 6th Floor
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorneys for Intervening Appellants

Dated: July 6, 2005

S: NR/cases2004015818A/Federated Insurance Supreme/brief on appeal